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No. 615

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES B. ROBINSON AND STEPHEN H. PAYSON,
PETITIONERS

v.

WILLIAM B. FRANKE, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	10
Conclusion	15

CITATIONS

Cases:	
Creary v. *Weeks*, 259 U.S. 336	13
Orloff v. *Willoughby*, 345 U.S. 83	13, 14
Statutes:	
Act of April 18, 1946, 60 Stat. 92	6
Act of August 7, 1947, 61 Stat. 816, 34 U.S.C. (1952 ed.)	10
Section 3b	10, 11, 12
Section 3b(a)	10
Section 3b(d)(1)	11
Administrative Procedure Act, Section 10 (5 U.S.C. 1009)	13
10 U.S.C.:	
Section 5573(a)(1)	10
Section 5582	10
Section 5582(b)	10
Section 5702	4, 13
Section 5706(4)	5
Section 5706(12)	5
Sections 5862–63	12
Section 6384	2, 9
Section 6384(a)	2, 5, 14
Section 6384(b)	2, 5

Statutes—Continued
10 U.S.C.—Continued
Page
Section 6384(c) 3, 5
Section 6388 ..... 3, 5, 9, 10, 11, 12
Section 6388(a) 3, 5, 9, 10
Section 6388(b) 3, 5
Miscellaneous:
37 Comp. Gen. 747 12
Navy Department, Court-Martial Order 1, 1949 11
Navy Department, Court-Martial Order 2, 1949 11
S. Rept. 2484, 84th Cong., 2d Sess., p. 19 11

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OPINION BELOW

The District Court for the District of Columbia did not enter an opinion in either case. The opinion of the Court of Appeals for the District of Columbia Circuit in *Payson* v. *Franke* (Pet. App. 17–23) is reported at 282 F. 2d 851. The order of the court of appeals in *Robinson* v. *Franke* (Pet. App. 24) is not yet reported.

JURISDICTION

The judgment of the court of appeals in *Payson* was entered on August 4, 1960. The order of the court of appeals in *Robinson* was entered on October 28, 1960. On October 28, 1960, the Chief Justice

extended the time for filing the petition for a writ of certiorari in *Payson* to and including January 2, 1961. The petition for a writ of certiorari was filed on December 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners had twenty years of naval service within the meaning of 10 U.S.C. 6384.

2. Whether petitioners were entitled to a hearing before they could be honorably discharged from the service under 10 U.S.C. 6384.

3. Whether there is judicial review of a determination of a Navy Selection Board that a naval officer's performance is unsatisfactory and that he would not satisfactorily perform the duties of a higher grade.

4. Whether the Navy Selection Board's determination that petitioners' performances were unsatisfactory was arbitrary and capricious.

STATUTES INVOLVED

10 U.S.C. 6384 provides in pertinent part:

> (a) Each selection board convened under chapter 543 of this title to recommend officers for promotion shall report, from among those officers eligible for consideration, the name of each officer with less than 20 years of service whose record, in the opinion of the board, indicates his unsatisfactory performance of duty in his present grade, and, in the opinion of the board, indicates that he would not satisfactorily perform the duties of a higher grade.
>
> (b) Each officer on the active list of the Navy or the Marine Corps whose name is re-

ported under this section shall, subject to subsection (d), be honorably discharged from the naval service on June 30 of the fiscal year in which his name is so reported * * *.

(c) The years of service that are counted under subsection (b) are—

(1) for a male line officer of the Navy or a male officer of the Marine Corps, his years of total commissioned service as computed under section 6387 of this title;

(2) for a staff corps officer, other than a woman officer appointed under section 5590 of this title and other than an officer in the Nurse Corps, his years of total commissioned service as computed under section 6388 of this title;

* * * * *

10 U.S.C. 6388 provides in pertinent part:

(a) For the purpose of the preceding sections of this chapter, the total commissioned service of each officer originally appointed in the grade of lieutenant (junior grade) or ensign in any staff corps of the Navy, who has since that appointment served continuously on the active list of the Navy, is computed from June 30 of the fiscal year in which he accepted that appointment. However, this subsection does not apply to officers appointed under the Act of April 18, 1946, ch. 141 (60 Stat. 92).

(b) Each other commissioned officer of the active list of the Navy in any staff corps is considered to have the same total commissioned service for the purpose of the preceding sections of this chapter as the officer in his corps described in subsection (a) having the maximum total commissioned service who—

(1) has not lost numbers or precedence; and

(2) is, or at any time has been, junior to the other officer for the purposes of eligibility for promotion and selection for promotion during that other officer's latest period of continuous service on the active list.

* * * * * *

STATEMENT

Petitioners instituted separate actions in the district court for declaratory judgments that their honorable discharges from the United States Navy were null and void (J.A. 1–4; R. II–6).[1] The district court first entered judgment against petitioner Payson, which was affirmed by the court of appeals (J.A. 108, Pet. App. 17). The district court, on the authority of the court of appeals' decision in *Payson*, thereupon entered judgment against petitioner Robinson (R. II–140). This decision was also affirmed, on the authority of *Payson* (Pet. App. 24).

Petitioners' counsel agrees here (Pet. 4), as he did in the court below (Pet. App. 28–29), that the facts in the two cases are identical for all relevant purposes. For that reason, and for purposes of simplicity, we shall refer to the facts in *Payson* as illustrative of both cases.

The Statutory Scheme. 10 U.S.C. 5702 provides for the convening of selection boards by the Secretary of the Navy for the purpose of recommending for promotion staff officers of the Regular Navy. For this purpose, the boards are provided the names

[1] Page references to the joint appendix in the court of appeals will be preceded by "J.A." Other parts of the record will be referred to as "R."

of all officers eligible for promotion and their records. 10 U.S.C. 5706(4), (12). The boards must "report * * * the name of each officer with less than 20 years of service whose record, in the opinion of the board, indicates his unsatisfactory performance of duty in his present grade, and, in the opinion of the board, indicates that he would not satisfactorily perform the duties of a higher grade." 10 U.S.C. 6384(a). Each officer so reported, with certain exceptions here immaterial, is to be honorably discharged from the Navy. 10 U.S.C. 6384(b).

10 U.S.C. 6384(c) provides that "years of service" of a staff officer are to be computed, for the purpose of determining his eligibility to separation under this section, in accordance with 10 U.S.C. 6388. Subsection (a) of the latter section provides that "the total commissioned service of each officer originally appointed in the grade of lieutenant (junior grade) or ensign in any staff corps of the Navy, who has since that appointment served continuously on the active list of the Navy, is computed from June 30 of the fiscal year in which he accepted that appointment." But 10 U.S.C. 6388(a) "does not apply to officers appointed under the Act of April 18, 1946, ch. 141 (60 Stat. 92)." Such an officer comes under 10 U.S.C. 6388(b), which provides, so far as material, that he "is considered to have the same total commissioned service * * * as the officer in his corps described in subsection (a) having the maximum total commissioned service who * * * is, or at any time has been, junior to the other officer for the purposes of eligibility for promotion and selection for promotion * * *."

The Pertinent Facts. On December 29, 1937, Payson accepted an appointment as a lieutenant (j.g.) in the Civil Engineer Corps of the United States Naval Reserve, but was not called to active duty until January 22, 1941 (J.A. 75). He remained in the Reserve until September 7, 1946, when he was appointed an officer in the Civil Engineer Corps of the Regular Navy, pursuant to the Act of April 18, 1946, 60 Stat. 92 (*ibid.*). By June 1949 Payson had received the permanent grade of commander and by November 1952 he was eligible for promotion to captain (*ibid.*). Payson's "officer of reference," for the computation of his years of service under Section 6388, was Mark Henry Jordan (J.A. 77). Jordan was appointed a line ensign in the Regular Navy on June 3, 1937, but did not accept an appointment as lieutenant (j.g.) in the Civil Engineer Corps of the Regular Navy until August 23, 1940 (J.A. 76).

On September 24, 1957, a Navy Selection Board, composed of six high ranking naval officers, was convened to review the records of all officers of the Civil Engineer Corps of the Navy on active duty eligible for promotion to the grade of captain and "with less than twenty years of service" (J.A. 77, 83–84, 86). The Board had before it only Payson's fitness reports upon which to determine his fitness for continuation in the Navy (R. 77). These reports showed, among other things, that in at least three assignments the opinions of Payson's commanding officers concerning his work declined as they became more familiar with him and his performance. His fitness reports for the period of August 31, 1945, to

April 30, 1946, when Payson was at Okinawa, reflected just such a decline. In October 1945 he was rated by his commanding officer as being an officer whom he "particularly desired" to have under his command and whom he would promote if only 10% of his fellow commanders were to be promoted (J.A. 8). On the last fitness report, six months later, the commanding officer stated that he would promote Payson only if 70% of his fellow commanders were to be promoted and reported that he would be not "pleased" but "satisfied" to have Payson under his command. It was also noted that Payson's "sense of responsibility is not as well developed as it is in the average officer of his age" (J.A. 11).

During his tour at Camp Lejeune, North Carolina, from March 7, 1951, to January 9, 1953, Payson's ratings began at 4.0 ("outstanding") and ended at 3.5 ("average") (J.A. 24, 45). Two reports during this period, one of them the final report, contained a note that Payson was "not too strong physically" and was "not too well qualified for promotion" (J.A. 39, 45).

From Camp Lejeune, Payson went to the Joint United States Mission in Greece. On November 8, 1954, his commanding officer reported that Payson had (J.A. 57):

> had financial troubles, and this with little work to do has, evidently, caused him to drink unwisely. On a foreign station this cannot be overlooked or condoned. I consider Commander Payson to be psychologically unfitted for foreign shore duty.

On this fitness report, he was designated as "[a]n acceptable officer," which is a category between "[u]nsatisfactory" and "[a] dependable and typically effective officer" (J.A. 57).

Payson's last duty station was Puget Sound Naval Ship Yard. Here, too, his fitness reports showed a constant decline (J.A. 62, 64, 66, 69, 71, 73). The last three reports, covering the year prior to the Selection Board's action, all noted that "additional assignments under more senior officers" were needed "to develop his emotional maturity and reliability" before Payson "should become qualified for independent duty" (J.A. 69, 71, 73).

The Selection Board considered the records of some 125 officers of the Civil Engineer Corps and found three eligible for promotion to captain (J.A. 84, 92–96). The Board also found that three officers, including petitioners, were not qualified for continued service since their records "indicate their unsatisfactory performance of duty in their present grade, and * * * that they would not satisfactorily perform the duties of a higher grade" (J.A. 84–85). This report was concurred in by the Chief of Naval Operations and approved by the Secretary of the Navy, the Secretary of Defense, and finally the President (Pet. App. 18).

Payson sought a declaratory judgment that the Selection Board's action concerning him was a nullity because (1) the decision had no basis in his records and therefore was arbitrary and capricious; and (2) by the time the Selection Board convened, he had completed twenty years' commissioned service with-

in the meaning of 10 U.S.C. 6388 for the purposes of 10 U.S.C. 6384, and was therefore not subject to being removed by a selection board (J.A. 3). Payson argued that Section 6388(a) required the computation of Jordan's service from the end of the fiscal year in which Jordan was appointed an ensign in the Navy (June 30, 1937), and thus both Jordan and Payson had over twenty years' commissioned service by the time the Selection Board was convened on September 24, 1957.

The district court entered summary judgment for the Government (J.A. 108). The court of appeals affirmed, finding on the basis of the legislative history and consistent administrative application that Jordan's commissioned service as a staff officer was to be computed for purposes of 10 U.S.C. 6388(a) from "the onset date of his staff corps service" (Pet. App. 21)—*i.e.*, from the end of the fiscal year of his appointment in the Naval Civil Engineer Corps, June 30, 1941. The court went on (Pet. App. 22):

> We are satisfied that the original statute, the departmental interpretations, the codification and the Comptroller General's decision * * * demonstrate that appellant's total commissioned service was correctly computed. Calculated as it was, appellant had not achieved the twenty years' service which would have insulated him from separation from service.

The court further held it not to be its "function to reassess the appellant's performance record" (Pet. App. 22) and noted that his record (Pet. App. 22–23):

> may well have appeared to an expert body to suggest an adequate basis for the conclusion

which was reached. This may seem especially the case where this appellant's record was to be contrasted with many others. The criteria were for the board in its sworn judgment to apply for the good of the service. Suffice it to say that we are in no position to assess and appraise that record by itself even were we free to do so.

ARGUMENT

1. In terms, 10 U.S.C. 6388(a) requires that Jordan's time of service be measured from his acceptance of an appointment as a *staff* officer. It specifically provides that "the total commissioned service of each officer originally *appointed* in the grade of lieutenant (junior grade) or ensign *in any staff corps* of the Navy, who has since *that appointment* served continuously on the active list of the Navy, is computed from June 30 of the fiscal year in which he accepted *that appointment*" (emphasis added). The clear meaning of the statute, that "that appointment" refers to the appointment "in [the] staff corps", is fortified by the fact that an appointment as a line officer is separate from an appointment as a staff officer and that a transfer from line to staff or vice versa requires a new appointment. See 10 U.S.C. 5573(a)(1), 5582.[2]

Section 6388 was derived from Section 202 of the Act of August 7, 1947, 61 Stat. 816, 34 U.S.C. (1952 ed.) 3b. See reviser's notes following 10 U.S.C. 6388. 34 U.S.C. 3b(a) provided that for the purposes of

[2] 10 U.S.C. 5582(b) provides that "[a]ny male officer on the active list in the line of the Navy * * * *may be appointed* to the active list of the Navy in the Supply Corps or the Civil Engineer Corps * * *." (Emphasis added.)

Section 3b the term "officers" shall mean "commissioned officers holding permanent appointments as such on the active list in the Staff Corps of the Regular Navy." Section 3b(d)(1) provided that, in respect to separation from the active list, "the total commissioned service of an officer" (*i.e.*, an officer "holding [a] permanent appointment * * * in the Staff Corps") "shall be computed from June 30 of the fiscal year in which he accepted such appointment * * *." The Judge Advocate General of the Navy in two formal opinions stated that under Section 3b(d)(1) only the time spent as a commissioned *staff* officer was to be used for computation of "twenty years' service" of such officer. Navy Department, Court-Martial Order 1, 1949, p. 12; Navy Department, Court-Martial Order 2, 1949, p. 40.

This interpretation of Section 3b(d)(1) was consistently applied by the Navy from the time of the Judge Advocate General's decision until Congress reenacted the statute in 1956 as 10 U.S.C. 6388 (J.A. 106). The reenactment, rather than being a modification of existing law, was intended only to codify existing law as construed and interpreted by judicial and administrative sources. See S. Rept. 2484, 84th Cong., 2d Sess., p. 19. Thus, whatever differences in language there may be between the 1947 Act and the present 10 U.S.C. 6388, Congress intended only to embody in the statute itself the 1948 and 1949 interpretations of the Navy Judge Advocate General.[*] This

[*] Petitioners claim (Pet. 14–15) that 10 U.S.C. 6388 did not codify the Navy Judge Advocate General's opinions because, wherever administrative opinions were intended to be codified,

was the position taken by the Comptroller General in an opinion in 1958 which gave 10 U.S.C. 6388 a construction identical to that reached by the court below in the instant case (37 Comp. Gen. 747, 749):

> There appears to be no reasonable basis to conclude that in the rewording used in the codification of section 202(d)(1) of the 1947 act [34 U.S.C. (1952 ed.) 3b(d)(1)], the words "any staff corps of the Navy" were substituted for the words "the Regular Navy" for a purpose other than that of expressing and adopting the administrative interpretation of that section which apparently was being followed consistently by the Department of the Navy—the only Department having personnel subject to such section. The Congress has adopted that interpretation by enacting plain and specific language based on such interpretation and, in our view, that plain language must be given its plain meaning and application.[4]

2. Petitioners' contention (Pet. 13) that they were improperly denied an administrative hearing authorized by 10 U.S.C. 5862–5863 is without merit. These

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this was stated in the reviser's notes. If petitioners are correct, Congress intended merely to reenact in 10 U.S.C. 6388 the meaning of Section 3b. As we have shown above, 10 U.S.C. 6388 is specific that Jordan's time of service must be measured from his acceptance of appointment as a staff officer. Thus, Congress clearly construed Section 3b to have this same meaning whether this construction was based on Section 3b alone or on Section 3b as interpreted by the Navy Judge Advocate General.

[4] This opinion of the Comptroller General rejected a proposal by the Navy Judge Advocate General (made in 1958 subsequent to the Navy's action in petitioners' cases) to overrule its earlier 1948 and 1949 opinions. The Navy has adhered to the Comptroller General's decision.

sections expressly relate to the action of an "examining board" for the consideration of naval officers before they are "promoted permanently to the grade of lieutenant." Petitioners were commanders (J.A. 75) being considered by a selection board convened under an entirely different provision of the Code (10 U.S.C. 5702).

3. The court below correctly held, relying on *Creary* v. *Weeks*, 259 U.S. 336, that there is no judicial review of a Navy selection board's determinations. In that case, a military officer similarly attempted to obtain judicial review of a determination of military boards that he "should not be retained in the service" for "causes due to his neglect, misconduct, and avoidable habits." 259 U.S. at 342. After noting that the military had followed the procedural and substantive rules laid down by Congress, this Court held that, "[s]uch being the case, the Supreme Court of the District was without power to review or in any manner control the conduct of the boards or the result of their action. *Dynes* v. *Hoover*, 20 How. 65, 82; *Johnson* v. *Sayre*, 158 U.S. 109; *Carter* v. *McClaughry*, 183 U.S. 365, 380; *Mullan* v. *United States*, 212 U.S. 516; *Reaves* v. *Ainsworth*, 219 U.S. 296, 304." 259 U.S. at 344. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94.

Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, has not changed this rule. For Section 10 specifically states that it has no application where agency action is by law committed to agency discretion and, as this Court has held, determination of military personnel matters "rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized com-

munity governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff* v. *Willoughby, supra,* 345 U.S. at 94. This is particularly true in the instant situation, since, as the court below noted (Pet. App. 22–23), the judiciary is not in a position to judge the factors that have weighed in the minds of a body expert in military matters that has reviewed the records of a large number of officers and found some to deserve promotion and others to warrant separation.

4. In any event, the record in this case precludes any suggestion that the action of the Naval Selection Board in finding petitioners unsatisfactory for further service was arbitrary or capricious. As we have shown (*supra,* pp. 6–8), after eight years as a commander and after five years of eligibility for promotion to captain, petitioner Payson's fitness reports still showed inability to exercise independent judgment and command responsibility. Petitioners' records clearly contain sufficient evidence upon which the expert board could find them unsuited for promotion or further service in their then present grade.[8]

[8] Petitioners also suggest (Pet. 3) that 10 U.S. 6384(a) is so vague as to be invalid. This contention is clearly without merit. A Navy selection board has the knowledge and background to determine whether a Naval officer's performance is satisfactory and whether he could satisfactorily perform the duties of a higher grade. Moreover, such a general standard was essential in order to give selection boards sufficient flexibility to meet whatever circumstances might arise.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	PAGE
FAILURE TO GIVE HEARING	1
NO BASIS SHOWN FOR BOARD'S ACTION	2
YEARS OF SERVICE	5
REVIEWABILITY	8
CONCLUSION	9

CASES *Citations*

Creary v. *Weeks*, 259 U. S. 336	8
Harmon v. *Brucker*, 355 U. S. 579	8
Clackum v. *United States*, C.Cls. 246-56, Jan. 20, 1960	8

STATUTES

10 USC 5573	6
10 USC 5582	6
10 USC 5862-5863	1, 2, 5
10 USC 6376	7
10 USC 6377	7
10 USC 6387	5
10 USC 6388	5, 6, 7
10 USC 6389	7

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Respondent

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Upon review of the Brief for the Respondent in Opposition, certain statements are noted which may leave the reader with a misconception of the applicable law and of the existing situation in certain instances. In view thereof it is considered appropriate that a reply brief be submitted on behalf of petitioners.

Failure to Give Hearing

Attorney for petitioners is greatly perplexed by respondent's statements that sections 5862 and 5863 of Title 10, United States Code, 70A Stat. 369, (Pet. App.

36-38) under which petitioners argue that they were entitled to a hearing (Pet. 13), "expressly relate to the action of an 'examining board' for the consideration of naval officers before they are 'promoted permanently to the grade of lieutenant,'" and that petitioners were not given opportunity for the prescribed hearing because they were "considered by a selection board convened under an entirely different provision of the Code." (R.Br. 12-13)

One need only read sections 5862 and 5863, *supra*, to ascertain that they apply, insofar as candidates for *permanent* promotions are concerned, to *all* officers "on the active list of the Navy" and insofar as candidates for *temporary* promotion are concerned, to *all* officers "on the active list of the Navy below the grade of rear admiral." In either event, petitioners are covered and to set forth that the provisions involved relate only to the consideration of naval officers before they are promoted to the grade of *lieutenant* is an obvious misstatement.

Moreover, the Secretary of the Navy's precept for the Board in this case clearly established the Board as a combination "selection board" *and* "examining board" to perform the functions of each such board (CCA Record, Payson 87-90), and, in fact, the Board *did* constitute itself "a Naval Examining Board" (CCA Record, Payson 85). Subsequently, the record of proceedings of the Board were submitted to the President as one "of sixteen naval officer selection boards and *examining boards*." (Emphasis added, CCA Record, Payson 78).

The question thus still remains unanswered as to why the Board ignored the procedure prescribed in 10 USC 5863, 70A Stat. 369, which would have given petitioners opportunity for a hearing.

No Basis Shown for Board's Action

Although specifically challenged to point out *anything* in the pertinent records in *Robinson* which would provide

any basis whatsoever for the Board's finding, the Solicitor General has chosen completely to ignore the challenge. (Pet. 8). Apparently fearful of the harsh glare of injustice irradiating from *Robinson*, he instead chooses to chase shadows in *Payson*.

It is submitted that this Court will not so easily be deceived. No one seriously argues that the shadows in *Payson* form the *ratio decidendi* for the Court of Appeals' decision. Otherwise the Court of Appeals would have found substance, not merely suggestion,[1] for an adequate basis for the Board's conclusion in *Payson*. What then is the reason for the Solicitor's agility in avoiding the facts of *Robinson*? May it be suggested that he also entertains reservations as to the correctness of the Court of Appeals' decisions, or is it a tacit admission that the Board's action with references to *Robinson*, if judicially reviewable, is unsustainable?

Let us, however, briefly look at the shadows in *Payson* to which respondent refers. Significantly, he does not deny that all of Commander Payson's fitness reports were satisfactory or better. Rather he alleges that "in at least three assignments the opinions of Payson's commanding officers concerning his work declined as they became more familiar with him and his performance."

But this statement by respondent is misleading inasmuch as the so-called declines in the first two cited assignments incorporate jumps from the report of one commanding officer to that of another. It is of course obvious that the various commanding officers will not employ the exact 'same' criteria in grading. Some will be liberal while

[1] This is, of course, in reference to the Court of Appeals observation in the Payson opinion (C. A. App. p. 22-23) that: "Various references therein [Payson's record] may well have appeared to an expert body to *suggest* an adequate basis for the conclusion which was reached." (Emphasis supplied)

others will be strict and it is self-evident that the law of averages will bring about ups and downs in the records of all but the most outstanding, or conversely, the most unsatisfactory officers.

The important thing is that none of the commanding officers gave Commander Payson a "flunking" grade. The situation is in some ways not unlike failing a student on a basis of consistently passing marks. Certainly no one would contend, that because one professor gave a student an A in his first semester of a course and another professor gave a B to the same student in the second semester, the student was actually doing F work. But this is exactly what the Government is contending in reference to *Payson*. And the penalty suffered by petitioners was much more severe.

Respondent also makes much of certain remarks which he takes out of context from Commander Payson's records. For example in reference to the report made out by his Commanding Officer at the Joint United States Mission in Greece in 1954, which is unquestionably Commander Payson's worst report (CCA Record, Payson 57), respondent on page 7 of his brief neglects to quote the first and last portions of the comments which are as follows:

> [First portion] During the period of this report there have been no duties of this command requiring an officer of the Civil Engineer Corps. The evaluation has, of necessity, been based on general observation . . . . [Last portion] He would, I believe, be an excellent officer when assigned to duty in the United States commensurate with his rank and corps.
>
> He has a pleasing personality and is considered well qualified to deal with the public in both personal and official contacts.

The aforesaid report, made out some three years before the Board found Commander Payson's performance of duty to be unsatisfactory, is the *only* report which was ever referred to Commander Payson for official comment.

And, in spite of the fact that this is by far Commander Payson's worst report, the reporting officer, Rear Admiral Ralph Earle, Jr., found his performance of duty in all aspects to be satisfactory or above. In effect, Admiral Earle rapped Commander Payson's knuckles for indiscreet use of alcohol. Commander Payson stated that this would not occur again and there is nothing to show that it did. If it had reoccurred, there was ample authority under 10 USC 5862-5866 to have given him a hearing and if he was found morally disqualified to perform the duties of his grade, to have discharged him.

Irrespective of the foregoing, it would seem about time that someone in the Government gave some reason for the finding of unsatisfactory service made by the Board in *Robinson*. What did he do? The Government having utterly failed on this score, it is submitted that respondent's "In any event" argument (R.Br. 14) must also fail, and that it would not be inappropriate for this Court again to ask the question upon the grant of the petition herein.

Years of Service

Respondent seems correctly to assess that the basic issue in regard to the computation of petitioners' years of service lies in whether 10 USC 6388(a) will permit the interpretation urged by petitioners, and has quoted from same with certain emphasis on page 10 of his Brief to the opposite effect. But, with somewhat different emphasis, the section may be seen not to be quite so clear as respondent would have the Court believe.

Firstly, it will be noted that the companion section, 10 USC 6387, is crystal clear that all line officers look under subsection (a) thereof to the date of *original* appointment or to June 30th of the year of *original* appointment, or under subsection (b), constructively to the years of service prescribed for an officer under subsection (a). It will

be readily apparent that the fact that the original appointment may have been in a staff corps pursuant to 10 USC 5573 will result in no "rebirth" should the officer be transferred *from* the staff corps *to* the line under 10 USC 5582.

Is section 10 USC 6388(a) capable of a consistent construction? That is, will section 6388(a) permit a construction whereby there will be no "rebirth" when the transfer is *from* the line *to* the staff corps? Petitioners submit that it will. Thus, in this connection, it may be seen that 6388(a) provides a means for computing "the total commissioned service of each *officer* originally appointed in the grade of lieutenant (junior grade) or ensign *in any staff corps* of the Navy, who since that appointment served continuously on the active list of the Navy . . . ."

The basic problem is whether the italicized portion *in any staff corps* can be construed to have reference to the preceding word *officer*, alone, or whether it must be deemed to constitute a phrase modifying *originally appointed*. Stated another way, the question is whether the section applies to an officer who is *in* any staff corps, or whether it merely applies to an officer who was *originally appointed in* any staff corps?

If *in any staff corps* was intended to refer to the *appointment*, then logically there should be something more in the section to show that individual to whom the computation applies is currently *in* the staff corps involved. For without such, the section applies not only to officers who may currently be in the staff corps but also to all officers who though originally appointed in a staff corps subsequently transfer to the line or another staff corps. In fact, officers transferring to the line would *at the same time* have their service computed *differently* under different sections, namely sections 6387 and 6388. But construed as urged by respondent, there is no requirement

in section 6388 that the officer concerned be *in* the staff corps concerned. On the other hand, if under the proper construction section 6388 is applicable to officers *in* a staff corps, as it would be under petitioners' construction, no further modification is needed to delimit the applicability of section 6388 to staff corps officers.

Moreover, under petitioners' construction, staff corps officers would have retirement and separation dates run substantially the same as their line contemporaries. But with respondent's construction, these dates for staff corps officers will occur entirely haphazardly. For example, John Joseph Cassidy, Jr. of the Naval Academy Class of 1938 is and will continue to be junior in rank to Mark Henry Jordan of the Class of 1937 (CCA Record, Payson 75-76). Yet according to respondent, the *junior* Cassidy will be up for mandatory retirement under 10 USC 6377 one year earlier than the *senior* Jordan.[2] Additionally, both would have their mandatory retirement delayed several years after their line classmates have been retired under 10 USC 6376. Still more ridiculously, under the next section, 10 USC 6389,[3] a *Reserve staff officer* originally appointed lieutenant (junior grade) about the same time that Jordan transferred to the staff corps would have four more years of "total commissioned service" than Jordan. With such remarkable inconsistency in the application of the law, it is little wonder that the Judge Advocate General of the Navy in 1958 attempted to change the 1949 opinions of his predecessor.[4] The subsequent in-

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[2] This assumes that both will retire in the grade of captain.

[3] While this section 6389 was added to the Codification under the Act of September 2, 1958, 72 Stat. 1509, it was originally in Section 411(c) of the Reserve Officer Personnel Act of 1954, 68 Stat. 1170.

[4] Respondent admits that this was the case (R.Br. 12, note 4). It may be of some interest to note that the earlier opinions antedated the Act of May 5, 1950, 64 Stat. 108, Section 13 of which made certain legal qualification and experience mandatory for Judge Advocates General, 50 USC 741.

terpretation proposed by the Judge Advocate General and that contended by petitioners would return the intended order to the existing administrative chaos.

Reviewability

Respondent has argued that on the basis of *Creary* v. *Weeks*, 259 U. S. 336, the action of the Board in this case is not reviewable (R.Br. 13). The non-applicability of this case has been covered in the petition heretofore submitted (Pet. 12) and it goes beyond the purposes of the petition to argue the matter fully here. Suffice it to say that *Creary* v. *Weeks* does not decide against judicial reviewability of an act which is *arbitrary and an abuse of discretion* by a military board.

The respondent thereafter continues to the effect that the Administrative Procedure Act has no application to "military personnel matters". (R.Br.13) It is submitted that this constitutes an admission by respondent of the full scope of judicial nonreviewability which the instant cases stand for, which is not only inconsistent with cases heretofore cited in reference to the question of judicial reviewability but also in conflict with the recent case of *Harmon* v. *Brucker*, (1958), 355 U. S. 579 of this Court involving a discharge, and with the recent Court of Claims decision *Clackum* v. *United States*, C.Cls. 246-56, January 20, 1960, wherein that Court held a discharge issued by the Air Force was illegal and invalid.

An impression may be gained from respondent's brief (R.Br. 14) that petitioners were judged unsatisfactory on a *comparative* basis. This, of course, is not true. What is involved here is not a question of promotion or lack of promotion, but, in effect, a *firing*. For promotion, the board was limited to "three (3) officers" whom it considered "best fitted".[5] Obviously this must be com-

[5] See The Secretary of the Navy's precept convening the Board, paragraph 5 (CCA Record, Payson, 87-88).

parative. But in considering officers for discharge, the criteria was "unsatisfactory performance of duty" with *no* requirement as to numbers or any indication whatsoever that it should be comparative.[6] As previously set forth, the Board's function in this case was not analogous to the thinning out of a herd but rather to the elimination of black sheep. And this latter was on a bureaucratic level where sheeps' records rather than the sheep themselves are looked at. (Pet. 5).[7]

Conclusion

For the reasons previously set forth in the Petition and in view of the arguments set forth in reply to Respondent's Opposition thereto, it is respectfully submitted that this writ of certiorari should be granted.

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[6] Ibid, paragraph 7.

[7] It may be of interest that a total of some 198 officers of the Navy and Naval Reserve were found unsatisfactory in the period of July 1, 1948 to July 1, 1958 (CCA Record, Payson, 104-105). Since there have unquestionably been substantially over 200,000 separate cases of officers being considered for promotion during this period, the rate of finding officers so unsatisfactory is less than .1%. This would make the rate of such findings by the Board in question well more than 2000% of the norm.